UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LITTLE TRAVERSE BAY BAND OF ODAWA INDIANS, Plaintiff,	)	
-v-	)	No. 1:15-cv-850
GRETCHEN WHITMER, ET AL., Defendants.	)	HONORABLE PAUL L. MALONEY

OPINION

Plaintiff, the Little Traverse Bay Band of Odawa Indians (the "Tribe") claims that in 1855, the United States entered a treaty with its predecessors and created an Indian reservation spanning more than 300 square miles in the Northwest portion of Michigan's Lower Peninsula. The Tribe seeks a declaratory judgment from the Court that the claimed reservation has continued to exist to this day and has not been diminished or disestablished by any government action.

The matter is before the Court on the Defendant's and Intervenor-Defendants' motions for summary judgment. Collectively, the Defendants assert that summary judgment is warranted on the Plaintiff's claim for a declaratory judgment and injunctive relief because no Indian reservation was ever created, or in the alternative, any reservation created was subsequently diminished.

First, a word on structure. Whether a reservation was created depends upon the construction of an 1855 treaty between the United States and the Tribe's political predecessors. But treaties between Indian tribes and the United States are not interpreted like other international compacts, other laws, or even other contracts. Instead, when construing an Indian treaty, the Court must "look beyond the written words to the larger context that frames the Treaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.'" *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (quoting *Choctaw Nation v. United*

States, 318 U.S. 423, 432 (1943)). Once versed in the relevant history, "[c]ourts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' runs counter to a tribe's later claims." *Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985).

But ultimately, for the reasons to be explained, the Court concludes that, after a review of the entirety of the historical record, summary judgment is warranted on the Tribe's claims because the 1855 treaty cannot plausibly be read to create an Indian reservation, even when giving effect to the terms as the Indian signatories would have understood them and even when resolving any ambiguities in the Treaty text in favor of the Indians.

I.

Historical Background & The Treaty of 1836.

The Little Traverse Bay Band of Odawa Indians is a federally recognized Indian Tribe that traces its origins back to the Odawa Indians that inhabited land in what is now northern Michigan. The Odawa were first encountered by European explorers in 1615, and they continued to occupy the northwest corner of Michigan's Lower Peninsula and portions of the Upper Peninsula in the centuries that followed.

The Indian tribes in Michigan began ceding territory to the United States in the 1820s and continued in the following decades. By the 1830s, the federal government, under the Jackson Administration, centered government policy on securing treaty cessions of land from Indians, removing Indians to lands further West, and encouraging non-Indian settlement as the United States expanded westward.

In Michigan, this sentiment culminated in the Treaty of 1836 (the "Treaty of Washington") because the Odawa and Chippewa Indians became aware of the United States' removal policy and attempted to negotiate an exchange of their lands for money and the right to remain in Michigan. In a petition to the Secretary of War (who was at the time responsible for government policy relating

to the Indian people), representatives stated that the principal objects of their visit were to "make some arrangements" with the government for "remaining in the Territory of Michigan . . . ." (PageID.8087–8088.) The petition acknowledged that the Odawa did not want to remove to the west of the Mississippi but offered to sell portions of their lands "with some reserves." (*Id.*) The Bands also emphasized that they wished to assimilate into the culture of the white settlers and sought assistance to do so through various forms of education. (*Id.*)

Shortly after receiving the petition, Secretary of War Cass privately acknowledged that the Chippewa and Odawa lands in Michigan were not a priority, as the United States did not contemplate the settlement of northwestern Michigan by white settlers in the near future. Nevertheless, he directed Indian Agent Henry Schoolcraft to negotiate with the Odawa and Chippewa Tribes in the area to do "full justice" to the Indians, but at the same time, "procure the land on proper and reasonable terms for the United States." (PageID.8096.) Cass instructed Schoolcraft that he could "allow no individual reservations[]" to the Indians and was to extinguish Indian title to the extent possible. (*Id.*) Finally, if necessary, particular bands were to be allowed to remain on reservations, but their tenure was to extend only until the United States decided to remove them. (*Id.*)

With the foregoing instructions, Schoolcraft negotiated the Treaty of Washington. First, Schoolcraft consolidated the Chippewa and Odawa Indians into a single (and artificial) political entity for purposes of the treaty negotiations because these separate tribes were generally interspersed, such that the land cessions Schoolcraft sought could not be achieved without having both tribes at the bargaining table.

Generally, the Indian bands who were party to the Treaty agreed to cede aboriginal title to approximately 13,837,207 acres of land within the Northwest Lower Peninsula and a portion of the eastern Upper Peninsula of Michigan. In exchange, they were to receive six reservations within Michigan, to be "held in common," including a 50,000-acre reservation on Little Traverse Bay,

various annuities and payments of debt, and other improvements such as schoolhouses and blacksmiths. Additionally, the Treaty of Washington contained provisions for the removal of the Bands from Michigan to the lands "West of the Mississippi," and the United States agreed to provide suitable lands there and to pay for the Tribe's move and for one year of subsistence.

When the Treaty of Washington went to the Senate for ratification, the Senators unilaterally altered the terms. Most importantly, the Senate added language rendering the reservations effective for only five years. ("For the term of five years from the date of the ratification of this treaty, and no longer, unless the United States grant them permission to remain on said lands for a longer period.") In exchange for this new five-year limitation, the Senate provided for a principal sum of $200,000, to be paid "whenever their reservations shall be surrendered," and until that time, the Bands would receive yearly interest payments. Schoolcraft was then tasked with persuading the signatory Bands to agree to the Senate Amendments to the Treaty. While they "strenuously opposed" the modifications, (PageID.10689), they were satisfied that the lands would not be needed for settlement for many years and that they would be allowed to remain until that time. (*Id.*) Thus, Bands approved the Articles of Assent and the treaty gained legal force. (PageID.6878.)

Events Between 1836 and 1855.

Once the Treaty of Washington was ratified, the Odawa and Chippewa sought other means to stay in Michigan. In 1839, the Chippewas of Little Traverse Bay wrote to the Governor of Michigan, Stephen Mason, to ask whether they would be allowed to become citizens if they made individual purchases of land from the United States, as other Indian groups near Kalamazoo had done. (PageID.8132–34.) Specifically, the Chippewa asked: (1) whether it would have the right to buy lands from the government; (2) whether those who wished to conform to the laws of Michigan would be allowed by the State to remain; (3) whether such Indians would be considered citizens; and

(4) whether they could purchase the lands at Little Traverse Bay where they presently resided. (*Id.*) There is no record of Governor Mason's response.

However, it appears that both the state and federal governments took a permissive attitude towards Indian land ownership. By 1848, the Acting Superintendent of Indian Affairs noted that the Odawa had been "making great efforts to secure themselves permanent homes" along Lake Michigan by "purchasing lands along the rivers and bays of the lake; their position enables them, with moderate efforts, to live well; . . . Some of the bands desire to participate in the privileges of citizenship and have presented a petition asking that the subject should be brought to the notice of the State government." (PageID.8164–8166.); *see also United States v. Michigan*, 471 F. Supp at 242 ("One way the Indians began to cope with [the uncertainty of removal] was to buy land in fee. The missionaries encouraged these purchases and some Indians used annuity money from the 1836 treaty to buy land.").

And more generally, the state government was receptive to the continued presence of Indians in Michigan. For example, the Michigan Legislature ratified the Michigan Revised Constitution in 1850, which allowed for persons of Indian descent to vote, so long as they were "civilized." However, the Revised Constitution was silent as to citizenship of the Indians. The following year, the Legislature passed a Joint Resolution formally requesting that the United States "make such arrangements for said Indians, as they may desire, for their permanent location in the northern part of this State[.]" (PageID.8205.)

Meanwhile, the federal government took no action to remove the Indians from Michigan. When the five-year term allotted by the Treaty of Washington expired in 1841, several Indian leaders from the Odawa and Chippewa wrote directly to President John Tyler seeking an extension of the reservation term, as the Treaty had expressly contemplated that it could be extended if the United States gave permission to remain for a longer period. (PageID.8143.) Neither President Tyler

nor any official in the Bureau of Indian Affairs responded to the petition. Ultimately, the United States took no action to remove the Indians from the reservations in 1841 or any time during the 1840s.

Beginning in the 1850s, settlement in northwest Michigan began to accelerate, and the federal government again took up debate over how to resolve the lack of a permanent home for the Odawa and Chippewa Tribes. For instance, Indian Agent Henry Gilbert lamented that many of the Indian communities in Michigan were scattered across the state, and that some had no permanent home in a report contained within the Report of the Commissioner of Indian Affairs for 1853. (PageID.7442.) He noted that the State was hospitable to the Indians and that the Indians would likely never consent to removal. He thus proposed establishing reservations for the benefit of the Indians to solve the problem. (*Id.*)

He continued to advocate for his plan in subsequent reports and in private letters to his superior, the Commissioner of Indian Affairs, George Manypenny. (*See, e.g.*, PageID.8285–86.) For example, Gilbert recommended to Manypenny in 1854 that the government should:

> [S]et apart certain tracts of public lands in Michigan in locations suitable for the Indians and as far removed from white settlements as possible and within which every Indian family shall be permitted to enter without charge and to own and occupy eighty acres of land—the title should be vested in the head of the family and the power to alienate should be withheld—All the land embraced with the tract set apart should be withdrawn from sale and no white persons should be permitted to locate or live among them, except teachers, traders, and mechanics specially authorized by rules and regulations prescribed by the State Government—It may also be safely left to the same authority to terminate the restriction of the power to alienate their lands whenever deemed expedient and at the same time the unappropriated lands in the tracts withdrawn from sale should be again subject to entry.

(*Id.*.)

Around the same time Gilbert was advocating on their behalf, the Chippewa and Odawa petitioned the United States to set the table for further negotiation, requesting that the United States inform them of their outstanding treaty rights under the 1836 Treaty. (PageID.8305.) After

submitting the Petition in January of 1855, Band leaders traveled to Washington to meet with federal officials and discuss their proposal, although no contemporaneous records of these meetings have been produced.

The month after the meetings in Washington, the Indian representatives sent a follow-up letter to Commissioner Manypenny acknowledging that the Bands would continue to discuss settling the outstanding treaty obligations in the coming summer and requested that any negotiations between the Bands and United States take place in Washington, rather than having the government send representatives to Michigan. (PageID.8313.) The Bands expressed some urgency: "This [the settling of the Tribe's outstanding claims] we want soon, that we may know what we should do—we need means to buy more lands and make improvements before the land shall be taken by white settlers near us." (*Id.*)

After meeting with the Bands in Washington, federal officials exchanged a flurry of internal correspondence in the Spring of 1855 in apparent anticipation of the treaty negotiations. In April 1855, Commissioner Manypenny wrote to the General Land Office Commissioner Wilson "regarding [the United States'] future relations with the Ottawa Indians remaining within the State of Michigan . . . ." (PageID.8320.) Manypenny requested that the Land Office withhold land within certain townships from sale "until it shall be determined whether the same may be required for said Indians." (*Id.*)

Commissioner Wilson then forwarded the request to the Secretary of the Interior, Robert McClelland. Wilson wrote that the object of withdrawing the lands from public sale was "to carry out the philanthropic views of the government in reference to these Indians, by enabling them to purchase home and farms for themselves, and to acquire the arts and comforts of civilized life, unprejudiced by the evil influence or example of such depraved whites as might wish to settle among them." (*Id.*) Wilson thus recommended to McClelland that President Pierce issue an Executive

Order withdrawing the lands from public sale. President Pierce did so on May 14, 1855. (PageID.8325.)

Agent Gilbert was also in contact with Commissioner Manypenny, writing him from his duty station in Michigan. On April 12, 1855, Gilbert wrote to Manypenny to highlight the pressure white settlers were exerting on the lands which would have been suitable for the Bands. He suggested that given the needed haste for the negotiations, it would be better to conduct them in Michigan. (PageID.8335.)

Later that month, Commissioner Manypenny wrote to Secretary McClelland to advise him about the United States' continuing obligation to provide the Bands' with lands West of the Mississippi. (PageID.8345–46.) He explained in part that, "There is no prospect of [the Bands] ever being willing to emigrate, nor does Michigan desire to have them expelled, but will consent to their being concentrated among suitable locations, where their comfort and improvement can be cared for and promoted without detriment to the State or individuals." (*Id.*)

Manypenny wrote again to McClelland on May 21, 1855, apparently in response to McClelland's request that he set forth his views for how best to handle the United States' outstanding obligations to the Tribes. (PageID.8376.) This correspondence appears to be the last word among federal officials on how to best handle resolution of the Indian claims.

In the letter, Manypenny explained that it was his opinion that "an officer or officers of this Department should be designated by the President to negotiate with the Indians with a view of adjusting all matters now in an unsettled condition, and making proper arrangements for their permanent residence in that state." (*Id.*) In his view, the government needed to take measures "to secure permanent homes to the Ottawas and Chippewas, either on the reservations or on other lands in Michigan belonging to the Government, and at the same time, to substitute as far as practicable, for their claim to lands in common, titles in fee to individuals for separate tracts." (*Id.*)

Secretary McClelland wrote back to Manypenny the same day. (PageID.8372.) In concise terms, he stated: I have read your communication of this date, in relation to the condition of the affairs of the Chippewa & Ottowas Indians of Michigan . . . and have to inform you that the view therein proposed are approved by the Department." (*Id.*) Accordingly, McClelland endorsed Manypenny's position and authorized Manypenny to pursue these objectives in negotiating a new treaty with the Chippewa and Odawa Indians. Thus, while officials had debated the desirability of placing the Odawa and Chippewa on Indian reservations for several years, their conclusion was that it was better to give individual tracts of land to families that would hold the land in fee.

Accordingly, with the full backing of the Secretary of the Interior, Commissioner Manypenny traveled to Detroit, Michigan in July of 1855, where he met with Agent Gilbert and representatives from the Indian Bands, including Assagon, Chief of the Cheboygan Band who spoke principally for the Odawa during the negotiations. Together, they spent seven days negotiating what became the Treaty of Detroit.

The Treaty Council.

The negotiations were recorded in a journal, although it is admittedly not a word-for-word transcript. Nevertheless, the journal provides significant insight into the negotiations underpinning what became the Treaty of Detroit, which is now at issue.

Manypenny began the Treaty Council with preliminary remarks, highlighting that the primary reason for the treaty talks was the Bands' belief that there remained outstanding obligations under prior treaties. (PageID.7087.) He explained that he had researched the questions posed to him by the Bands during their prior visit to Washington and was prepared to explain what the United States viewed its obligations to the Bands to be. (*Id.*) Accordingly, Manypenny and Gilbert devoted the first portion of the treaty talks to discussion of the prior treaties and accounted for how and where

monies had been paid from the United States to various Bands to meet those prior obligations. (*See* PageID.7087–7092.)

Once Manypenny and Gilbert had discussed the various payments and annuities, talk at the Treaty Council turned to land. The Bands recalled that under the 1836 Treaty, the United States had promised to acquire land west of the Mississippi for them. (PageID.7095.) The Bands were aware, by the time of the Treaty Council, that the possibility existed that the United States would provide lands in Michigan, rather than requiring them to move west and requested that the government allow them to select the lands necessary for their settlement: "Before we left the Saut we were told that we should receive lands in this state in place of land west of the Mississippi. If so, in what manner will the matter be arranged? We wish if it is your design thus to give us lands to accept and locate them where we please." (*Id.*)

Manypenny responded that "the Government is desirous to aid you in settling upon permanent homes. As it is not desired to remove you, it will be a matter of conference between us as to how this shall be done and how much land shall be given to you." (*Id.*)

Agent Gilbert then added that the United States maintained its obligation to pay $200,000 under the 1836 Treaty, and in addition, the government would "provide . . . homes & is willing that those homes shall be in the State of Michigan." (*Id.*) Gilbert explained that the first priority in resolving these issues was the location of the land. He explained that the government did not expect all of the Bands to live in one location, but would instead provide tracts sufficient for small settlements in different places, but that the Bands should "collect[] into communities." (*Id.*)

After Agent Gilbert's explanation, the Treaty Council adjourned for the day. When the parties returned the following day, they again took up selection of the lands. Band leaders voiced concern with the selection process; they did not want to select lands without seeing them in person. Assagon stated: "When a white man wants to buy land, he does not go blind fold & buy a piece he

does not know, and so it is with us. The lands where we come from are not so good as the lands here. Much of them are heavy & swampy & we must select only such as are good for agriculture." (PageID.7097.) Accordingly, Assagon declared that the Bands would not select any lands until they could see them in person.

Manypenny quickly put this concern to rest: "The difficulty in selecting land can be easily remedied. It is not the desire of your great father to give you bad lands. I think you should have as good as the whites & it is not asked of you to select your individual farms here. We merely wish you to determine generally the sections of the state in which communities of you wish to locate." (PageID.7098.)

Talks then turned to the amount of land to be given and the type of land ownership to be granted. Many of the Indian representatives emphasized that they had already been successfully purchasing lands and requested that the lands to be given to them be issued with patents, so "as to prevent any white man, or anybody else from touching these lands." (PageID.7099.)

After hearing from the representatives, Manypenny agreed to the request: "In relation to the patents I think there will be no difficulty. It shall be an absolute title, save a temporary restriction upon your power of alienation." (PageID.7101.) He also explained how to remedy the land-selection problem:

> I think the difficulty with regard to the selection of lands may be remedied. We do not expect that each head of a family can select his own particular piece of land here today, but that each band has its mind fixed, or can have it fixed on some particular part of the country, within which they can select the tracts they desire.

(PageID.7101.) That afternoon, Gilbert met with Band representatives to designate the areas where the Bands wished to locate.

The following day, the negotiations continued, and more details were hashed out. For instance, Manypenny explained that the lands to be given would not result in Indians forfeiting lands

that they had already purchased. (PageID.7102.) Agent Gilbert also clarified that "it is the intention of the Government to allow each head of a family 80 acres of land & each single person over 21 years of age[,] 40 acres." (PageID.7103.)

Finally, the federal officials continued to emphasize that the government intended for the land to be used as permanent homes for individual Indians families: "Now this idea that the land will be pulled from under you originates either in error, or something I cannot comprehend. I advise you all to shut your ears to it. I told you at first that while all should have permanent homes, there would be a restriction upon the individual[']s power of alienation. And all these difficulties the young man made in his speech, about the land descending to your heirs . . . are wrong. You shall have good, strong papers, so that your children may inherit your lands." (PageID.7105.)

By July 30, the Band leaders assented to accept land rather than money, and the negotiations turned to other topics, including who would be entitled to take the land offered, how the United States would pay the $200,000 principal owed to the Bands, taxes, and settlement of other payments and annuities. Assagon, speaking on behalf of all the Odawa and Chippewa, requested that the federal government retain the principal ($200,000) owed to the Bands under the 1836 Treaty and maintain the yearly interest payments: "It is our design not to spend it all but leave it in your hands." (PageID.7146.) Earlier in the negotiations, other representatives had voiced similar feelings. One representative, Wasson, analogized the ongoing federal annuities and interest payments to "a little swan"—stating that he did not wish to cut the swan open, but instead to "let him live, that our father may feed him & he may continue to bring us shillings in his bill." (PageID.7128.)

Agent Gilbert refused the Bands request by harkening back to Wasson's swan metaphor. He said, "The Government must pay the money at all events, & only desires you to dispose of it for the best. In all your deliberations I want you to take good care of that little swan Wasson told us about." (PageID.7150.)

When the negotiations resumed later that afternoon, Gilbert continued, explaining that the goal of the United States with respect to the negotiations, was to "have you civilized citizens of the State—taking care of yourselves." (*Id.*) Gilbert then made his proposal for gradually ending the United States' administration of the Bands' annuities and payments:

> Among the whites, when a man has children the time comes, or is supposed to come, when they know enough to take care of themselves. So it is with you. We think you should be restricted in the full care of this land & money for a few years, yet we think that the time will shortly come, when you can take care of them for yourself. Now though we advise you to take care of the little swan, we want you to remember that by & by he will get so old that he will not pay for keeping. The government is willing to take care of your property; but if you improve for the next twenty years as fast as you have during the last five, I tell your great father that you can take care of it as well for yourselves, as he can for you. So that I think we must fix a time, when your connection with the U.S. shall cease. Now I make this proposition to you, that the U.S. pay you the interest of your money for ten years, besides $10,000 per yr of the principal. Then in addition to that $200,000 will be due to you at the end of ten years, & that at that time the whole amount be paid to you– unless the Indians & the President think it better to extend the time further. That will be a subject for agreement at that time. That will give you an annuity for ten years, which will average about $23,000 per yr.

(PageID.7151.)

Ultimately, the Bands agreed with Gilbert. As Assagon put it:

> Our Father, our minds have been a little troubled. Now since our little swan is to live ten years & not diminish by age, we wish you to feed him, & are willing to take the interest & the $10,000 for ten years. And we wish you in the meantime to take good care of the swan, so that we shall find him in good order. (PageID.7152.)

Accordingly, the Treaty Journal clearly demonstrates that United States negotiated to end its administration of the Tribes' monetary affairs within ten years, and the Tribes agreed to those terms. (*Id.*)

After resolving these issues, each of the Bands signed the Treaty. Assagon stated, "The treaty is signed & we are satisfied. Our father has been liberal with us. All we now hope is that the treaty will be honestly executed." (PageID.7160.)

The Treaty of Detroit.

The resulting Treaty of Detroit is reflective of the negotiations captured in the journal and the parties' stated intentions in the months leading up to the treaty negotiations. In Article I, the Bands and the United States addressed land. In general terms, Article I provided that the United States would withdraw large swaths of land in Michigan from sale for each Band, so that eligible Indians (heads of families, unmarried adults, and orphans) within each Band could make their own selections of land within their Band's designated area, for which they would hold the patent (after a ten-year restraint on alienation). Land selections were to take five years. Once that period expired, the United States would make the unselected lands within the larger, Band-designated sections available for purchase exclusively to members of the Bands—i.e., an additional five-year window where the land was not available for white settlement. And finally, once both five-year windows ended, any lands that had gone unselected and unpurchased would remain the property of the United States, which could dispose of it just as it could "other public land."

The remaining treaty provisions established the timeline for the United States' payments to the Band, stipulating that the United States would make all of the requisite payments within ten years (Article 2), a release of any claims arising under prior treaties (Article 3), the continued provision of interpreters (Article 4), the dissolution of the artificial political entity Schoolcraft had created to join the Odawa and Chippewa Tribes (Article 5), and established that the terms were binding upon the treaty signatories upon ratification (Article 6).

After the treaty was signed, Manypenny and Gilbert transmitted a report to the Acting Commissioner of Indian Affairs, Charles Mix. (PageID.8410–8412.) The men recapped the negotiations and summarized the terms of the treaty as executed. (*Id.*) A few days later, President Pierce issued an executive order to have the lands subject to the treaty be "temporarily withdrawn from sale." (PageID.8358.)

In November 1855, the Treaty was not yet ratified, but Manypenny spoke of it in his Annual Report.

Manypenny wrote:

> New conventional arrangements, deemed requisite with the Indians in the State of Michigan have been entered into with confederate tribe of Ottowas and Chippewas . . . . By them, the Indians are to have assigned permanent homes to be hereafter confirmed to them in small tracts, in severalty. Such guards and restrictions are thrown around their lands and limited annuities as cannot fail, if faithful regarded and respected, to place them in comfortable and independent circumstances.

(PageID.7532 (emphasis added).)

Agent Gilbert similarly described the Treaty negotiations in his own report dated October 10, 1855, which was appended to Manypenny's report:

> New arrangements relative to their [the Bands'] unsettled claims upon the United States were settled by articles of agreement and convention, concluded at Detroit, on the 30th of June last. . . .
>
> As the articles agreed upon have not yet been ratified it may not be proper for me to allude particularly to their details. I will only say of them that the main feature is a provision securing to each family and to such single persons as are provided for, a home in Michigan; and I cannot doubt that if the treaty is ratified it will effectually check their roving habits and lead them to become permanently located, and to depend more entirely upon the cultivation of soil for subsistence.

(PageID.7558 (emphasis added))

The Senate and President then ratified the Treaty of Detroit with few modifications, none of which are particularly relevant here. First, Gilbert proposed some minor modifications to the contours of some of the parcels because of difficulties allocating the lands within them; the Bands agreed with the modifications, and the changes were incorporated upon Senate ratification. The Senate also added a term to protect settlers with preemption claims, as it appeared that a very small number of settlers—Gilbert references three cases in one of his letters—had pre-existing claims to parcels of land that was withdrawn from sale by the government to be given to Band members. Finally, federal officials made one additional adjustment to the lands available for selection under

the Treaty in 1856, but this was again pre-approved by the Bands. The Treaty was formally ratified on April 15, 1856 and later proclaimed on September 10, 1856.

Post-Treaty Events.

While the Court's obligation is to interpret the legal meaning of the 1855 treaty, it must do so with an eye toward what the parties to the treaty—and especially the Indian signatories—understood the terms to be. Therefore, the Court must also account for the post-treaty actions between the Indians and the United States as they are at least minimally probative of the parties' understanding of the treaty's legal effect, recognizing, however, the direction of *Klamath,* that the Court cannot ignore plain treaty language which runs counter to the Tribe's claims. *Cf. Solem v. Bartlett*, 465 U.S. 463, 472 (1984) (explaining that subsequent history of land is relevant in disestablishment context to ascertain Congressional intent).

As an initial matter, the Treaty was not well-implemented. The government was slow to compile the list of eligible Indians, and even many of those who were promptly recognized as eligible did not have their selections recorded. Compounding the error, the Indian Agents responsible for passing along the selections repeatedly transmitted land descriptions rife with incorrect descriptions such that they could not be recorded by the General Land Office. (PageID.10972–76; PageID.10951–52 (Agent Long recounting the failures of previous Indian Agents to diligently report the Indians' land selections).) There were additional failures by the government to ensure that once a selection was made and recorded, a certificate to the land issued to the selecting Indian.

The United States also failed to make some of the promised annuity payments. The failed annuity payments were problematic as they frustrated Indians from purchasing land as contemplated by the second five-year period from which the land was withheld from sale by white settlers. Ultimately, this treaty provision was suspended, once the government recognized that some eligible

Indians were essentially acting as straw purchasers, using money supplied by white settlers to purchase lands from the government, and then selling to the white settlers.

There was also significant turnover among the federal officials charged with implementing the treaty terms after 1855. Gilbert and Manypenny did not remain in office long enough to see the terms of the treaty implemented. In particular, the Indian Agent for Michigan changed frequently during the time for administration of the treaty terms. There were at least four Indian Agents in Michigan after Gilbert: Smith, Fitch, Leach, and Long.

The turnover in federal office led to confusion. As early as 1862, Agent Leach lamented that the Indian settlements were "widely scattered" across Michigan. Then in 1864, Agent Leach wrote to Indian Affairs Commissioner Dole to recommend that the "Little Traverse Bay Reservation" be "enlarge[d]." (PageID.10907.) Around the same time, Commissioner Dole wrote another Indian Affairs employee, H.J. Alvord, to request that Alvord assist Agent Leach "in negotiating treaties with the Indians of the State of Michigan." (PageID.10909.) Dole explained that the "great object" of the contemplated treaties was to "secure an abandonment of numerous smaller reservations and concentration of them upon at least three and if possible two reserves." (PageID.10909.) Specifically it would be desirable for "the Ottawas and Chippewas . . . to relinquish[] . . . their smaller reservations and concentra[te] upon . . . 'the Great and Little Traverse reserves.'" (PageID.10910.)

Additionally, the federal government misconstrued Article 5 of the Treaty. The Bands had negotiated to end the artificial coupling of the Odawa and Chippewa Tribes. *See United States v. Michigan*, 471 F. Supp at 247–48. But by the late 1860s, the treaty terms had been sufficiently muddled that the government erroneously interpreted the 1855 treaty to cease all relations with the Bands once the final annuity payment had been made—something no one had contemplated in 1855. And in fact, the federal government terminated federal recognition of the Bands in 1872.

Ultimately, it was not the executive branch which resolved the issues arising out of the 1855 Treaty, but Congress. In 1872, Congress passed an act stating that "all lands remaining undisposed in the Reservation made for the Ottawa and Chippewa" would be "restored to market." Congress passed additional acts in 1875 and 1876, building on the 1872 Act and ensuring that the Indians entitled to lands under the 1855 treaty received their patents, but otherwise restoring the land for public sale.[1]

Finally, the Court notes that during the time period from 1855 to 1872, there was significant discussion among federal officials, Indians, and the public, of the land as "reserves" and "reservations." For example, Indians and their interpreters regularly referred to Reservations in communications with federal officials. (*See* PageID.10798 (Chief Shawwahno's headmen "got a map of their Reserve"); PageID.3987 (Chief Oshawwano went to "survey the land I pointed out to you last July for our reservation.); Medaawmaig-Gilbert, 1.8.1857, PageID.10801 ("in regard to our Reservations"); Hamlin-Fitch, 2.28.1859, PageID.10803 ("Little Traverse Reserve"); Cobmosay-Fitch, 7.4.1859, PageID.10807 (Council held "on the Ind. Reservation," and report of "very bad men on this Reservation").

Similarly, Commissioner Manypenny wrote to the Commissioner of the General Land Office in 1856 after it came to light that the General Land Office intended to issue patents to a few white settlers that had purchased land within the territory reserved to the Bands. Manypenny wrote that the withdrawal of the lands was "as fully set apart for Indian purposes" so he urged the Land Office to vacate the patents made to white settlers. (PageID.10836.) Manypenny also wrote in his 1856 Annual Report to Congress that he had directed that a blacksmith shop located at Grand Traverse to be moved "to the Reservation selected by the Indians." (PageID.7614.) Similarly, Agent

[1] While the Court believes this description to be an accurate summary of the Opening Acts, it expresses no opinion as to whether the lands in question were disestablished or diminished.

Gilbert transmitted a list of descriptions for selections of land made by the Band members in 1857: "I transmit here with list of Ottawa & Chippewa Indians . . . who have already selected lands on the several reservations, with a description of the tract or parcel selected in each case." (PageID.10844 (emphasis added).) And leading up to 1872, many Annual Reports of the Commissioner of Indians Affairs to Congress regularly referred to the tracts withdrawn under the 1855 Treaty as "reserves" or "reservations." *See, e.g.*, 1857 ARCOIA, PageID.7618 (reporting that "the reserves assigned to the Ottawas and Chippewas under the late treaty have been partially surveyed.").

However, some of these references are not easily understood. For example, Indian Agent Fitch claimed in the 1858 report that the "Ottawas and Chippewas have twelve reservations". 1858 ARCOIA, PageID.7633. By the next year, Agent Fitch wrote that the Ottawas and Chippewa had *seventeen* reservations, which had been created "under the treaty of 1855." 1859 ARCOIA, PageID.7658. And Fitch's error was continued in later reports. *See* 1860 ARCOIA, PageID.7664 (reporting on the "seventeen reservations in this agency"); 1861 ARCOIA, PageID.7669 (reporting on visits to "most of their reservations"); 1863 ARCOIA, PageID.7683-7685 (reporting on the "fourteen reservations" of the Ottawa and Chippewa and advocating for consolidation on "the Little Traverse reservation"). 1867 ARCOIA, PageID.7724 (the "reservations are 14 in number.").

It is not at all clear how Fitch arrived at this number, as even the Tribe's interpretation of the Treaty, as asserted in this case, is that it created eight reservations via the land descriptions contained in the numbered paragraphs within Article I. These seemingly erroneous reports are just another example of the confusion that arose during treaty implementation.

One possible explanation for the inflated number of "reservations" is that the individual band members eligible for land had made their selections near each other. Leach, not having been at the Treaty Council, could have considered these groupings to be "reservations," as the land was not yet

available for settlement by non-Indians. In any event, the reports written by Agent Leach and the other Indian Agents that followed him have less evidentiary value based on this peculiarity.

II.

A. Summary Judgment

Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories and admissions, together with the affidavits, show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see, e.g.*, *Tucker v. Tennessee*, 539 F.3d 526, 531 (6th Cir. 2008).

The burden is on the moving party to show that no genuine issue of material fact exists, but that burden may be discharged by pointing out the absence of evidence to support the non-moving party's case. *Bennett v. City of Eastpointe*, 410 F.3d 810, 817 (6th Cir. 2005) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). The facts, and the inferences drawn from them, must be viewed in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Once the moving party has carried its burden, the non-moving party must set forth specific facts, supported by record evidence, showing a genuine issue for trial exists. Fed. R. Civ. P. 56(e).

"The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255 (citing *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158–59 (1970)). The question, then, is "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that [the moving] party must prevail as a matter of law." *Anderson*, 477 U.S. at 251–252; *see, e.g.*, *Resolution Trust Corp. v. Myers*, 9 F.3d 1548 (6th Cir. 1993) (citing *Anderson,* 477 U.S. at 249) (noting the function of the district court "is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial").

B. Treaty Construction

As mentioned in the opening paragraphs, the Court must "look beyond the written words to the larger context that frames the Treaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.'" *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (quoting *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943)). Once versed in the relevant history, "[c]ourts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' runs counter to a tribe's later claims." *Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985).

An examination of the historical context is especially important because it "provides insight into how the parties to the Treaty understood the agreement[,]" and the Court must give effect to the treaty terms "as the Indians themselves would have understood them." *Mille Lacs*, 526 U.S. at 197. Additionally, to the extent that the Treaty contains ambiguities, they must be "resolved from the standpoint of the Indians," *Winters v. United States*, 207 U.S. 564, 576–77 (1908), so long as the words used "are susceptible of a more extended meaning than their plain import as connected with the tenor of their treaty." *Soaring Eagle Casino v. NLRB*, 791 F.3d 648, 656 (6th Cir. 2015).

III.

A. Preliminary Matters

The briefing on the motions for summary judgment has raised several distinct legal issues that bear on the ultimate question of whether a reservation was created. For example, one set of Intervenor-Defendants claims that the Court is not required to reach the historical record because the terms of the 1855 Treaty are clear on their face. But as the Court has explained, these Defendants are incorrect, and the Court must include and account for historical context in its analysis. *Mille Lacs*, 526 U.S. at 196; *Klamath*, 473 U.S. at 774.

Similarly, there is a debate among the litigants about the use of treaties to which the Tribe's predecessors were not a party. Put simply, several other treaties negotiated by Commissioner Manypenny—from around the same time but involving other Indian tribes—use standard language to establish Indian reservations. The Defendants, to varying extents, rely on these other treaties to suggest that the 1855 Treaty of Detroit did not create an Indian reservation.

The Court will not consider such treaties when assessing whether an Indian reservation was created. The United States Supreme Court explicitly rejected a comparable approach in *Mille Lacs*. 526 U.S. at 202 ("An argument that *similar* language in two Treaties involving different parties has precisely the same meaning reveals a fundamental misunderstanding of basic principles of treaty construction." (emphasis added)). The Supreme Court's position was grounded in the Indian Canons; injecting the history and context of another tribe (with a different background, potentially different language, and different priorities) would eviscerate the requirement that the Court view the treaty from the signatory tribe's perspective. *See id.* ("[An analysis of the history, purpose, and negotiations of *this Treaty* leads us to conclude that the Mille Lacs Band did not relinquish their 1837 Treaty rights in the 1855 Treaty." (emphasis in original)).

Now, the Supreme Court *did* compare treaties involving different tribes in *Mille Lacs*, as the Defendants point out. However, the Court did so to conclude that an Indian tribe's usufructuary rights were *not* extinguished:

> The entire 1855 Treaty, in fact, is devoid of any language expressly mentioning—much less abrogating—usufructuary rights. Similarly, the Treaty contains no language providing money for the abrogation of previously held rights. These omissions are telling because the United States treaty drafters had the sophistication and experience to use express language for the abrogation of treaty rights. In fact, just a few months after Commissioner Manypenny completed the 1855 Treaty, he negotiated a Treaty with the Chippewa of Sault Ste. Marie that expressly revoked fishing rights that had been reserved in an earlier Treaty. *See* Treaty with the Chippewa of Sault Ste. Marie, Art. 1, 11 Stat. 631 ("The said Chippewa Indians surrender to the United States the right of fishing at the falls of St. Mary's . . . secured to them by the treaty of June 16, 1820").

Id. at 196. In other words, the lesson of *Mille Lacs* is that the use of treaties involving other Indian tribes is not a two-way street. While comparator treaties might be useful when deciding whether the United States had negotiated for the extinguishment of a pre-existing right, they cannot be used to assess what an Indian tribe understood the language of a treaty to mean.

The Court also notes that treaties previously negotiated by the same Indian tribe *can* be considered for the same reasons that other treaties involving other tribes cannot. Because both the treaty at issue and any prior treaties are part of the tribe's history, there is no risk that the use of language would be understood differently by the tribe's members. This practice is supported by *Mille Lacs* as well, because the Court interpreted an 1855 Treaty in part by reference to an 1837 Treaty involving the same Indian tribe. *See, e.g.*, 526 U.S. at 195–97. Accordingly, the Court will consider the 1836 Treaty of Washington in its overall assessment of the historical context at issue now.

Finally, the litigants offer up substantially different interpretations of the most fundamental legal concept now at issue: What does it take for the United States to create an Indian reservation, as that term is used in 18 U.S.C. § 1151?

As a general matter, Congress defined Indian Country as: (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government; (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." 18 U.S.C. § 1151. Courts apply these definitions of Indian Country in both civil and criminal matters, although § 1151 is technically within the criminal code. *See, e.g.*, *Buzzard v.*

Oklahoma Tax Comm'n, 992 F.2d 1073, 10176 (10th Cir. 1993) ("For purposes of both civil and criminal jurisdiction, the primary definition of Indian country is 18 U.S.C. § 1151.").

The question, therefore, is what is required to create an Indian Reservation under § 1151(a)? Several cases are worth discussion on this point. First, in *Donnelly v. United States*, the defendant had been convicted in federal court of a murder that occurred within the limits of an Indian reservation known as the "Extension of the Hoopa Valley Reservation." 228 U.S. 243 (1913). The issue was whether the territory constituted "Indian Country" to convey jurisdiction to the federal courts. The Court ultimately concluded that it was, as "nothing [could] more appropriately be deemed 'Indian Country' . . . than a tract of land that, being a part of the public domain, is lawfully set apart as an Indian reservation." *Id.* at 269. Notably, this case was decided well before Congress passed § 1151.

United States v. John, a post § 1151 case, involved an Indian charged and convicted in federal court for assault. 437 U.S. 634 (1978). There, the lower courts held that the Indian Reorganization Act did not apply to the Choctaw Reservation, because at the time it was enacted, the Mississippi Choctaw were not a federally recognized Indian Tribe. Thus, when the Secretary of the Interior issued a proclamation in 1944 purporting to proclaim a reservation for the Mississippi Choctaw under the authority granted by the Indian Reorganization Act, it was ineffective. Accordingly, the Fifth Circuit had vacated the conviction because it concluded that the district court lacked jurisdiction because the assault had occurred on land that was not "Indian Country."

The issue for the Supreme Court was whether the land was "Indian Country," when it had been: (1) purchased by the United States for the Choctaw, (2) later taken into trust, and (3) later still, been proclaimed to be a reservation. It first noted that the principal test for assessing whether land was an Indian reservation was "whether the land in question 'had been validly set apart for the use of the Indians as such, under the superintendence of the Government.'" *Id.* at 649 (quoting *United*

States v. Pelican, 232 U.S. 442, 34 (1914)). It then concluded that "[t]he Mississippi lands in question here were declared by Congress to be held in trust by the Federal Government for the benefit of the Mississippi Choctaw Indians who were at that time under federal supervision." *Id.* Accordingly, it found that "[t]here is no apparent reason why these lands, which had been purchased in previous years for the aid of those Indians, did not become a "reservation," at least for the purposes of federal criminal jurisdiction at that particular time." *Id.*

Next up is *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998). There, the Supreme Court's task was to interpret "dependent Indian Community" as that term was used in 18 U.S.C. § 1151(b). The *Venetie* Court noted that prior to the passage of § 1151(b), it had decided a series of cases and concluded that in some circumstances both "dependent Indian Communities" and "Indian allotments" were "Indian Country." *Id.* at 528–29. In a footnote, the Court also explained that in addition to Indian allotments and dependent Indian communities, it had held, "not surprisingly, that Indian reservations were Indian Country." *Id.* at 528 n.3 (citing *Donnelly*, 228 U.S. at 243).

Finally, the Supreme Court again used the three-prong *John* test in *Oklahoma Tax Commission v. Citizen Band*, albeit with little discussion, and in the context of a resolving a claim of tribal sovereign immunity. 498 U.S. 505, 511 (1991) (quoting *John*, 437 U.S. at 648–49)). Of note, the Court rejected Oklahoma's attempt to establish a different test for Indian Country, which would have distinguished trust land from reservations. *Id.*

The Defendants rely on the *John* test, asserting that an Indian Reservation is created by: (1) an action setting apart land; (2) a requirement that the land set apart be used "as such," meaning used for Indian purposes; and (3) federal superintendence over the land. The Tribe sees it differently. Under its view of the law, the reservation-creation test is "flexible," and simply requires some federal action creating a "set aside" of land. It relies primarily on *Donnelly* for this proposition.

After a full review of the caselaw, the Court does not find the Tribe's position persuasive; there is no basis for concluding that the test for whether a reservation was created should be different in this case and distinguished from the chosen test the Supreme Court has repeatedly cited to evaluate whether a reservation was created.

While the *Venetie* Court cited *Donnelly* in a footnote—solely to establish that Indian reservations are "Indian Country"—it does not mean that the *Donnelly* "test" is the prevailing standard for creation of an Indian reservation. If it was the prevailing standard, the Court would have used it in *Citizen Band* just two terms later. And as recently as March 2019, other federal district courts have applied the *John* test when interpreting a treaty to assess whether a reservation was created. *See Oneida Nation v. Village of Hobart*, 371 F. Supp. 3d 500, 509 (E.D. Wis. 2019). Accordingly, when interpreting the 1855 Treaty in historical context, and with an eye toward what the Indian signatories understood, the Court will assess whether the Treaty "validly set apart" the disputed lands "for the use of the Tribe as such, under the superintendence of the Government." *Citizen Band*, 498 U.S. at 511.

B. The 1855 Treaty and the Creation of a Reservation

Having dispatched with the preliminaries, the Court now takes up the core dispute: Whether the terms of the 1855 Treaty can be reasonably read to create a reservation from the perspective of the signatory Bands.

1. Pre-Treaty Negotiations

The Court will not repeat the lengthy historical record here, but a few points bear emphasis.

First, the intentions of the United States in agreeing to negotiate a treaty with the Tribe's predecessors are clear from the historical record. By 1855, officials had for years debated the best way to resolve the government's outstanding obligations under the 1836 Treaty, and how best to navigate the conflicts created by the deluge of white settlers that were descending upon Michigan, in

increasingly close proximity to several Indian tribes. Some officials, like Agent Gilbert, favored the creation of reservations for the Bands.

However, when the time for treaty negotiations drew near, Secretary McClelland requested that Gilbert's superior, Commissioner Manypenny set forth his view for the government's handling of the negotiations. Manypenny did so in his May 21, 1855 letter, and his view diverged significantly from the proposals Gilbert had continually promoted. Commissioner Manypenny wrote that the government ought to "take measures" to "secure permanent homes to the Ottawas and Chippewas, either on the reservations or on other lands in Michigan belonging to the Government, *and at the same time, to substitute as far as practicable, for their claim to lands in common, titles in fee to individuals for separate tracts.*" Based on this language, Manypenny clearly departed from Gilbert when it came to the creation of a reservation because he urged the government to provide permanent homes for the Indians by giving them individual allotments, to be held in fee, in exchange for their claims to lands held in common.

However, Manypenny's proposal also created a problem. Where would the government get the land to give to the Bands? The first dependent clause addresses precisely this question because the lands would come from "either . . . the reservations or . . . other lands in Michigan belonging to the Government[.]"

Manypenny's use of "the reservations" is instructive because it makes clear that he is referring to *existing* reservations, as opposed to creating new reservations. This is a clear reference to the reservations created by the 1836 Treaty. Keep in mind, these reservations were temporary, but the Bands had been allowed to remain on them throughout the 1840s and up until 1855 because the lands had not been required for white settlement. Accordingly, Manypenny was suggesting that because the temporary reservations had never been settled, the government could draw from those

lands to provide permanent homes to the individual Indians, who hold fee title to their separate parcel of land.

In the same letter, Manypenny also explained that the outstanding $200,000 payment from the United States to the Tribes for relinquishment of the reservations could be reduced by "the value of the lands which they might receive in lieu of the old reservations[,]" with the aggregate value to be paid "in such manner as would be acceptable and beneficial to them— being invested or paid as might hereafter be agreed on." (*Id.*)

In summary then, Manypenny's letter—as adopted by McClelland—identified the two primary objectives of the United States for the impending treaty negotiations: (1) the provisioning of permanent homes for Indians who had signed the 1836 Treaty, with said homes being broken into "separate tracts" with the title in fee belonging to the individual, rather than being held in common by the Band; and (2) the settlement and consolidation of monies and services owed to the Indians under previous treaties.

Second, the Indian motives in the lead-up to the 1855 Treaty are also readily apparent because the Bands wrote a petition to the United States explaining their objectives. In part, they requested that the interest payments they were receiving under the Treaty of 1836 be dispensed to their children "*to enable them to pay for lands and the Taxes*[.]" They also expressed a desire to settle the outstanding obligations for the same reasons: "[W]e need means to buy more lands and make improvements before the land shall be taken by white settlers near us." Accordingly, the unmistakable intention of the Bands going into the treaty negotiations was securing additional monetary compensation so that they could continue to successfully buy up lands as they had been since at least the 1840s.

2. Treaty Negotiations

The Court also considers the Treaty Journal strong evidence to be considered within the broader historical context. The Supreme Court repeatedly relied on such a treaty journal to divine the Indian understanding of the treaty at issue in *Mille Lacs*. *See, e.g.*, 526 U.S. at 185, 197, 222.

The Treaty Journal captures the sentiment of the pre-negotiation history just discussed. Manypenny and Gilbert repeatedly emphasized that the lands would be given to individual Indian families, with patents, so that the lands would remain with each family indefinitely. Manypenny explained that the Band members would hold lands just as he did.

The pair also assuaged concerns among the representatives that the selected lands would be worthless or uninhabitable. Their solution was to allow each Band to generally designate the region of Michigan where the Band wished to reside so that the Government could withdraw the land from public sale without further delay to prevent further advances by white settlers. Then, once the land was withdrawn from sale, the individuals entitled to land would be allowed to make their selection after doing the necessary exploration and evaluation to ensure that the land they selected would be suitable for settlement. Finally, Gilbert and Manypenny emphasized that the government wanted to end its control and administration of the Tribes' resources because continued federal superintendence over the Tribes' lands and resources would inhibit their ability to assimilate into "civilized" life.

Manypenny's negotiating tactics mirror his ideal course of action for the government, as described in his letter to Secretary McClelland. First, he offered separate tracts of land to the Indians, for which each family would hold title in fee in exchange for settling the outstanding 1836 Treaty obligations and without providing for any lands to be held in common as a reservation. And then he consolidated the monetary obligations owed to the Bands and established an end-date for the United States' continued administration of the funds.

3. The 1855 Treaty

Ultimately, "[c]ourts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' runs counter to a tribe's later claims." *Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985). Therefore, since the Court has set forth what it views to be the relevant pre-Treaty historical context, it will now evaluate the legal effect of the 1855 Treaty.

a. Have the lands been "validly set apart" for use as a reservation?

The first element for creation of a reservation is a federal set-aside of land for use as an Indian reservation. *John*, 437 U.S. at 648–49. There is no dispute that Article 1 allocates land. However, the parties disagree as to whether the terms amount merely to individual allotments or whether they were intended to create a reservation. The Court thus must turn to the terms themselves.

Article I provides:

> The United States will withdraw from sale for the benefit of said Indians as hereinafter provided, all the unsold public lands within the State of Michigan embraced in the following descriptions to wit:[2]
>
> * * *
>
> *Third*, for the Beaver Island,—High Island, and Garden Island in Lake Michigan, being fractional townships 38 and 39 north, range 11 west—40 north, range 10 west, and in part 39 north, range 9 and 10 west.
>
> *Fourth*, for the Cross Village, Middle Village, L'Arbrechroche and Bear Creek Bands, and of such Bay Du Noc and Beaver Island Indians as may prefer to live with them , townships 34 to 39, inclusive north, range 5 west—townships 34 to 38, inclusive north, range 6 west,—townships 34, 36, and 37, north, range 7 west, and township 34 north, range 8 west.
>
> * * *
>
> The United States will give to each Ottowa and Chippewa Indian being the head of a family, 80 acres of land, and to each single person over twenty-one years of age, 40 acres of land, and to each family of orphan children under twenty-one years of age

[2] Article I then delineates parcels of land for each of the eight Bands or groups of Bands present at the negotiations in separate, numbered paragraphs. The Court has included only Paragraphs Third and Fourth below because those paragraphs relate to the Tribe's predecessors.

containing two or more persons, 80 acres of land, and to each single orphan child under twenty-one years of age, 40 acres of land to be selected and located within the several tracts of land hereinbefore described under the following rules and regulations:

Each Indian entitled to land under this article may make his own selection of any land within the tract reserved herein for the band to which he may belong—Provided, That in case of two or more Indians claiming the same lot or tract of land, the matter shall be referred to the Indian agent, who shall examine the case and decide between the parties.

For the purpose of determining who may be entitled to land under the provisions of this article, lists shall be prepared by the Indian agent, which lists shall contain the names of all persons entitled, designating them in four classes. . . . Such lists shall be made and closed by the first day of July, 1856, and thereafter no applications for the benefits of this article will be allowed.

At any time within five years after the completion of the lists, selections of lands may be made by the persons entitled thereto, and a notice thereof, with a description of the land selected, filed in the office of the Indian agent in Detroit, to be by him transmitted to the Office of Indian Affairs at Washington City.

All sections of land under this article must be made according to the usual subdivisions; and fractional lots, if containing less than 60 acres, may be regarded as forty-acre lots, if over sixty and less than one hundred and twenty acres, as eighty-acre lots. Selections for orphan children may be made by themselves or their friends, subject to the approval of the agent.

After selections are made, as herein provided, the persons entitled to the land may take immediate possession thereof, and the United States will thenceforth and until the issuing of patents as hereinafter provided, hold the same in trust for such persons, and certificates shall be issued, in a suitable form, guaranteeing and securing to the holders their possession and an ultimate title to the land. But such certificates shall not be assignable and shall contain a clause expressly prohibiting the sale or transfer by the holder of the land described therein.

After the expiration of ten years, such restriction on the power of sale shall be withdrawn, and a patent shall be issued in the usual form to each original holder of a certificate for the land described therein, Provided That such restriction shall cease only upon the actual issuing of the patent; And provided further That the President may in his discretion at any time in individual cases on the recommendation of the Indian agent when it shall appear prudent and for the welfare of any holder of a certificate, direct a patent to be issued. And provided also, That after the expiration of ten years, if individual cases shall be reported to the President by the Indian agent, of persons who may then be incapable of managing their own affairs from any reason whatever, he may direct the patents in such cases to be withheld, and the restrictions provided by the certificate, continued so long as he may deem necessary and proper.

* * *

> All the land embraced within the tracts hereinbefore described, that shall not have been appropriated or selected within five years shall remain the property of the United States, and the same shall thereafter, for the further term of five years, be subject to entry in the usual manner and at the same rate per acre, as other adjacent public lands are then held, by Indians only; and all lands, so purchased by Indians, shall be sold without restriction, and certificates and patents shall be issued for the same in the usual form as in ordinary cases; and all lands remaining unappropriated by or unsold to the Indians after the expiration of the last-mentioned term, may be sold or disposed of by the United States as in the case of all other public lands.
>
> Nothing contained herein shall be so construed as to prevent the appropriation, by sale, gift, or otherwise, by the United States, of any tract or tracts of land within the aforesaid reservations for the location of churches, school-houses, or for other educational purposes, and for such purposes purchases of land may likewise be made from the Indians, the consent of the President of the United States, having, in every instance, first been obtained therefor.
>
> It is also agreed that any lands within the aforesaid tracts now occupied by actual settlers, or by persons entitled to pre-emption thereon, shall be exempt from the provisions of this article; provided, that such pre-emption claims shall be proved, as prescribed by law, before the 1st day of October next.
>
> Any Indian who may have heretofore purchased land for actual settlement, under the act of Congress known as the Graduation Act, may sell and dispose of the same; and, in such case, no actual occupancy or residence by such Indians on lands so purchased shall be necessary to enable him to secure a title thereto.

Article I thus accomplishes the broad withholding of land envisioned by Manypenny to solve the land-selection problem (raised by the Bands during the Treaty negotiations) in its first breath; the United States "agreed to withdraw from sale," all of the unsold public land within the eight numbered paragraphs that followed for the "benefit of the Indians."

In other words, Paragraphs 3rd and 4th identified the broader parcels of land from which heads of households within the Bands would carve out their 80-acre sections as promised in the Treaty Journal—a promise that is effectuated by the very next paragraph:

> "The United States will give to each Ottowa and Chippewa Indian being the head of a family, 80 acres of land. . . to be selected and located within the several tracts of land hereinbefore described under the following rules and regulations: . . . ."

Accordingly, the most basic treaty terms relating to land are clear and unambiguous from the face of the Treaty. The United States obligated itself to withdraw from public sale swaths of land, as had been designated by the various Bands at the Treaty Council. The purpose of the withdrawal was to ensure that adequate land was available to give every head of a family 80 acres of land (with smaller parcels for orphans and other eligible Indians).

But the last clause in the foregoing paragraph makes clear that the land is subject to additional "rules and regulations[.]" Foremost among these additional rules is a requirement that "[e]ach Indian entitled to land under this article may make his own selection of any land within the tract reserved herein for the band to which he may belong." This additional restriction meant that entitled Indians were limited to selecting land from within the bigger parcel chosen by their representative at the Treaty Council.

After these geographic terms establishing which lands would be withdrawn from sale for each of the Bands, Article I continues, setting forth additional procedures for determining eligibility, documenting land selections, and disposing of the lands once Indian selections were finished.

First, the Treaty directs the Indian Agent to prepare a list of names for persons eligible to take lands under the treaty terms. Once the list of names was completed, eligible Indians had five years to make their selections; another nod to the concerns of Band representatives that the persons selecting land should have time to see the lands in person and carefully decide on a parcel before making the formal selection. Once a selection of land was made, it was the Indian Agent's duty to transmit the land description to the government in Washington to begin the process of issuing a patent to the landholder.

The patent process was also laid out in comprehensive detail by the Treaty. First, once a selection was made, the person selecting the land could take immediate possession. The United

States was also obligated to issue a certificate to memorialize the selection, which also started the clock on the non-alienation period: "After the expiration of ten years, such restriction on the power of sale shall be withdrawn, and a patent shall be issued in the usual form to each original holder of a certificate for the land described therein[.]"

In addition to the land *selection* procedures, the Treaty also allows for a second five-year window for Indians to make additional land *purchases*. In this second window, "[a]ll the land embraced within the tracts hereinbefore described,"—that is, all of the land identified in the numbered paragraphs—"that shall not have been appropriated or selected within five years" remained the property of the United States. However, the United States agreed to allow the signatory Bands the exclusive right to purchase the lands with "entry in the usual manner and at the same rate per acre, as other adjacent public lands are then held[.]" With respect to lands purchased in this second window, the United States would issue patents immediately and there would be no restraint on alienation.

Finally, after both five-year windows closed, the parties contemplated that there would remain land within the designated parcels that had not been selected or purchased. These lands could "be sold or disposed of by the United States as in the case of all other public lands."

When the Treaty is placed in the proper historical context and interpreted with that context in mind, the only reasonable conclusion is that the plain and unambiguous terms do not create a federal set aside of land for use as a reservation, nor did the Tribe's predecessors understand them to do so. As described, Article I clearly and methodically laid out what the parties intended to accomplish:

> (1) Band representatives at the Treaty Council identified a particular area of Michigan where their members would be able to select a 40 to 80 acre parcel of land depending on their familial status;

> (2) the United States withdrew the designated lands from public sale so they would not otherwise be sold and would remain available for selection by individual band members;
>
> (3) the United States (through the Indian Agent) would compile a list of eligible members within a year;
>
> (4) The individual Band members were then allowed five years to make their land selection from the parcel designated by their representative at the Treaty Council;
>
> (5) Once a selection of land was made, the United States issued a certificate, which authorized the selector to possess the land, but which would contain a restraint on alienation for ten years;
>
> (5) Then, once the five-year term for land selection expired, all the lands not selected "remain[ed] the property of the United States," and the government continued to withhold them from public sale, to allow Band members purchase the unselected land at the same prices and using the same methods as other public land was sold;
>
> (6) Finally, ten years after the Band members were first able to make their selections, any land that had gone unselected and unpurchased could be "sold or disposed of by the United States as in the case of all other public lands."

These terms are perfectly consistent with Manypenny's stated desire that the United States provide permanent homes to the Ottawa and Chippewa by providing them with individual tracts of land, with the title to the land being held in fee by each head of household. And it is precisely what was debated and painstakingly negotiated during the Treaty Council, as evidenced by the Treaty Journal.

With this understanding, the Court concludes that the 1855 Treaty failed to create an Indian reservation because it did not create a federal set aside of land for Indian purposes. *See Citizen Band*, 498 U.S. at 511.

b. Did the Treaty establish ongoing federal superintendence?

In addition to creating a federal set-aside of land for Indian purposes, the Treaty must demonstrate ongoing federal superintendence over the land to meet the elements of a reservation. It fails to do so.

First, the parties agreed that after the temporary restraint on alienation, the land would be owned by the individuals, who would hold patents, and the lands would be freely alienable: "After the expiration of ten years, such restriction on the power of sale shall be withdrawn, and a patent shall be issued in the usual form to each original holder of a certificate for the land described therein[.]" While the Treaty provided a narrow exception for Indians deemed to be incompetent, the expectation of the Bands was that certificate-holders would receive their patents after the temporary restraint on alienation lifted and that they would be free to hold or dispose of the lands as white settlers held their lands. Additionally, there is no evidence in the record that a patent was ever withheld from an Indian certificate-holder on the basis of incompetency. Moreover, any lands that went unpurchased and unselected could be freely disposed of "as other public lands"—meaning that they could be made available for homesteading, used as a military installation, or for any other purpose as decided by the federal government.

For the land *purchased* by the Indians—as opposed to land *selected*, there were not even temporary restraints on alienation or other indicia of ongoing federal superintendence: "[A]ll lands, so purchased by Indians, shall be sold without restriction, and certificates and patents shall be issued for the same in the usual form as in ordinary cases[.]" Accordingly, the Bands expected to be able to freely dispose of these lands immediately. And this did occur; there were reports of Indians purchasing land, but then selling the lands to white settlers.

While this practice ultimately resulted in the suspension of the land-purchasing window, it provides a vivid demonstration of the *lack* of federal superintendence. The government was able to

suspend further purchases by Indians because the lands which had not yet been selected or purchased remained property of the United States.

However, the government was not otherwise able to intervene into the straw-purchases made by white settlers because once a sale between the government and a Band member was consummated, the government lacked any continuing interest in the land, and thus lacked any ability to regulate the lands under the 1855 Treaty. If the parties understood the land to be set aside as an Indian reservation, the United States could have (and likely would have) rescinded the sales by the Indians because the sales frustrated the primary objective of the Treaty—establishing "permanent homes" for the Odawa and Chippewa Indians. Instead, the United States could only suspend further sales to Indians to prevent any additional straw purchases.

Next, Article Two establishes that the United States would pay a total of $538,400 to the Bands in various sums and at various rates, but that all the payments would be concluded within ten years. Recall the discussion of the "little swan" from the Treaty Journal: While the Bands wished for ongoing federal oversight through the continued annuities payments, the government was not interested in such an arrangement. Gilbert even went so far as to borrow the metaphor of the little swan to explain why the government would not accept such an arrangement. Under these circumstances, the Bands clearly understood that the 1855 Treaty did not provide for ongoing federal superintendence.

The other articles of the Treaty do not implicate federal superintendence in any fashion. Article 3 released the government from any of the promises it made under the 1836 Treaty. Article 4 provided for the continued provision of interpreters at Sault Ste. Marie, Mackinac, and the Grand River for five years, or longer if the President deemed it necessary. Providing interpreters at government expense does not rise to the level of superintendence. The remaining Articles (5 & 6)

do not create any substantive rights or obligations and thus cannot bear on the question of reservation creation.

Under these circumstances, the Treaty lacks the hallmarks of ongoing federal superintendence and the Tribe's claim that a reservation exists must fail for this additional reason. *See Citizen Band*, 498 U.S. at 511.

IV.

The Tribe's arguments in favor of a reservation having been created are not persuasive.

First, as a general matter, the Tribe opts not to offer a coherent recitation of the relevant historical context or of the 1855 Treaty. It instead provides a seemingly never-ending series of tables of "sample record facts" which it then disputes with fragmentary quotations, divorced of their context and quoted in isolation. By way of example, refer to the Tribe's Table 4, which is reproduced below. (PageID.11839–41.)

Table 4: Sample record facts contrary to State's claim that the Treaty Negotiators agreed to "unrestricted, individual land ownership" not a permanent reservation. Br. PageID.9666-9669.	
McClelland-President, 4.12.1855, JA.113, PageID.8343	Recommending setting aside lands to be to the "greatest possible extent separated from evil example a [sic] annoyance of unprincipled whites who might be suposed [sic] to settle" near or among the Indians.
Manypenny-McClelland, 4.25.1855, JA.114, PageID.8346	Recommending that they be "concentrated upon suitable locations" like those who have had "fixed locations . . ."
Manypenny-Gilbert, 5.11.1855, PageID.3983	"[T]he whole subject of their alleged claims and unsettled business is now under the consideration of the department, as well as the propriety of at once locating them permanently upon reservations."

Tract Book, T38N, R6W, PageID.3822	Tract book representative of the Emmet and Charlevoix County withdrawals marked "This Twp reserved for Indian purposes by Order of the President May 14, 1855. See instructions to R&R [Register & Receiver] May 16, 1855."
1855 Journal, JA.10, PageID.7156	"This treaty is for the permanent benefit of you & your children & we have not talked of its provisions with a forked tongue."
Id., PageID.7135	Manypenny, "The Government is desirous to aid you in settling upon permanent homes."
Id., PageID.7140	Shawwasing, "The land where we come from is good. We want to locate there . . . [w]e consider this land a gift."
Id., PageID.7142	Gilbert, "We have looked over the maps since yesterday & have been compelled to change your locations in some respects; but this only changes the boundaries . . ." Gilbert, "What the Government wants is for all Indians to share alike . . ."
Id., PageID.7144	Manypenny, "[A]ll should have permanent homes" secured by "good, strong papers"
Id., PageID.7146	Manypenny, "It is our design now to give in the language of the [1836] Treaty a 'suitable home.'"
Id., PageID.7156	Manypenny, "This treaty is for the permanent benefit of you & your children & we have not talked of its provisions with a forked tongue."

Valentine, TA.123, PageID.11074-11077	"The importance of patents is clear, as they provide the legal means of protecting the Chippewas from ever being removed from their reservation." Describing Ojibwe use of "permanent homes" and "strong papers" as terms "guaranteeing and safeguarding ownership[.]" Explaining "The Concept of Patent and Deed in the Ojibwe Language" and the importance of Commissioner Manypenny's discussion of strong papers. Describing the "lack of direct equivalents in Ojibwe for almost every land term in the treaty[.]" Describing the single Anishnabemowin word for both patents and trust certificates
Valentine Rebuttal, TA.152. PageID.11347-11376	Linguistic analysis demonstrating that the Indian negotiators understood that the 1855 Treaty provided permanent homes in "bounded areas that would have been understood as reservations."
Id., PageID.11363-11369	Discussing translation of the word "reservation"
St.Br.Ex.B, PageID.9710	The Indians understood that they "will receive patents for [their] lands, which will be the establishment of permanent occupation of your Reservations, which you will never be ordered to leave."
Manypenny-Hendricks, 4.8.1856, TA.66, PageID.10836	Describing lands "set apart for Indian purposes"
Smith-Dougherty Letter, 2.8.1858, TA.74, PageID.10857	Concerning cancellation of non-Indian claims in "Ind. Reserve lands"
1867 ARCOIA, JA.66, PageID.7725	Stating "reservations were set apart for the sole benefit of the Indians"

Wilson-Taylor, 5.5.1868, TA.91, PageID.10903	Stating that certain tracts of land, "having been withdrawn and reserved" under the 1855 Treaty were not available for settlers
Hoxie, TA.153, PageID.11382- 11387	Historical analysis of the 1855 Treaty considering contemporaneous understanding of public land law and federal Indian policy

Many of the entries within the table are misleading. Refer to the second entry within the table, which reads:

Manypenny-McClelland, 4.25.1855	• Recommending that they be "concentrated upon suitable locations" like those who have had "fixed locations"

Here's what Manypenny actually wrote:

> There is no prospect of their ever being willing to emigrate, *nor does Michigan desire to have them expelled, but will consent to their being concentrated upon suitable locations*, where their comfort and improvement can be cared for and promoted without detriment to the State or individuals.

(PageID.8346 (emphasis added).) The Tribe's attribution of the quote is thus incorrect, as Manypenny was not *recommending* anything; the letter laid out in objective fashion the issues the Bands were experiencing in Michigan and the State's attitude towards them. (*Id.*)

And not only is the entry misleading, but Table 4 is conspicuously devoid of reference to Manypenny's May 21, 1855 letter, where he *did* make a recommendation to Secretary McClelland—one that does not support the Tribe's position. As previously discussed, Manypenny wrote that "as far as practicable" the United States should create permanent homes for the Bands by providing separate tracts of land to be held by individuals in fee. It was this recommendation that McClelland endorsed, and which became the official policy position of the federal government going into the

Treaty negotiations. McClelland's May 21 letter also undercuts the Tribe's reliance on the other internal federal communications that predate it, contained in Entries 1–3.

Additionally, Manypenny and Gilbert confirmed after their negotiations that this objective had been achieved. Gilbert reported that the "main feature" of the 1855 Treaty was "a provision securing to each family and to such single persons as are provided for, a home in Michigan[.]" (PageID.7558) Manypenny summarized the effect of the treaty by explaining that the "Indians are to have assigned permanent homes to be hereafter confirmed to them in small tracts, in severalty." (PageID.7532.)

Now consider Entry 7 to Table 4, which is a quotation from the Treaty Journal:

PageID.7140.	• Shawwasing, "The land where we come from is good. We want to locate there . . . [w]e consider this land a gift."

Shawwasing's full statement reads:

> I have come forward to speak my mind upon the subject [settling the Bands' outstanding claims]. I accept your proposals. I will not differ from my brethren. I speak for those who live on the north side of the Straits of Macinac. Knowing that you wish us to be of one mind I say for the three bands North of the Straits, that we wish to make one location, together. The land where we come from is good. We want to locate there. *We wish you to know that some of us have bought lands. We have now a missionary with us to teach us the good way. We wish you to give us patents wherever we locate.* We consider this land a gift.

(PageID.7140 (emphasis added).)

Thus, when the language strategically omitted by the Tribe is returned to Shawwasing's statement and read in its proper context, the record demonstrates that he wanted to communicate that some of the Indians within his Bands had already been purchasing land. He understood that the lands offered by the government would be owned by individuals, as he requested that the government provide patents—note the use of the plural form—for wherever they chose to locate.

Under these circumstances, Shawwasing's quote provides no support for the Tribe's theory that the Band representatives understood they were bargaining for a reservation.[3]

While these are just two examples, they are emblematic of the Tribe's briefing. It has proffered pages upon pages of this hit-and-run argumentation, leaving the Court to run down each of the quotes, to be placed in the proper context, and to then ascertain what the "fact" is that should be drawn from the proffered citation. This is plainly insufficient.

The Tribe's discussion of the Treaty in the briefing is similarly flawed because it does not provide a cohesive interpretation of the Treaty as a whole and instead isolates particular phrases from the Treaty to suggest that it was possible that the Bands understood that they were to receive reservations.

Primarily, the Tribe suggests that language like "tract reserved" or "aforesaid reservations" is indicative of the Tribe's understanding that the Treaty created an Indian reservation. Take, for instance, the first time that "tract reserved" appears in the text of the Treaty:

> Each Indian entitled to land under this article may make his own selection of any land within the *tract reserved* herein for the band to which he may belong—Provided, That in case of two or more Indians claiming the same lot or tract of land, the matter shall be referred to the Indian agent, who shall examine the case and decide between the parties.

The Tribe suggests that the use of "tract reserved" here means that the Band members understood the Treaty to create a reservation. That is not the case. When placed in the proper context, this language clearly and unambiguously refers to the numbered paragraphs that immediately precede it. It simply means that eligible Indians were entitled to make their selection of land from within the larger tract designated for his Band. For example then, the head of a family within the Beaver Island band was thus limited to selecting an 80-acre parcel from within the land description referenced in

[3] Notably, Entry 7 is the only entry in Table 4 addressing Indian understanding. The remaining entries are all from the perspective of federal officials.

the Paragraph Third, rather than any of the other seven parcels withheld from sale for the other Bands to make their selections. The use of "tract reserved" is not capable of a broader meaning when placed in this context.

Similar contextualization derails the Tribe's position regarding another paragraph, which references "tracts of land within the aforesaid reservations." That paragraph states:

> Nothing contained herein shall be so construed as to prevent the appropriation, by sale, gift, or otherwise, by the United States, of any tract or tracts of land within the aforesaid reservations for the location of churches, school-houses, or for other educational purposes, and for such purposes purchases of land may likewise be made from the Indians, the consent of the President of the United States, having, in every instance, first been obtained therefor.
>
> It is also agreed that any lands within the aforesaid tracts now occupied by actual settlers, or by persons entitled to pre-emption thereon, shall be exempt from the provisions of this article; provided, that such pre-emption claims shall be proved, as prescribed by law, before the 1st day of October next.

The Tribe asserts that the reference to "aforesaid reservations" is indicative of an intent to create an Indian reservation. Again, the Court does not find that this paragraph supports that construction when it is read in full. As pointed out by the Intervenor-Defendants, the use of the word "reservations"—or a similar term—was necessary here to *avoid* creating an ambiguity that would be created if the text read: "Nothing contained herein shall be . . . construed . . . to prevent the appropriation . . . by the United States, of any tract of land within the *aforesaid tracts*."

Under such a reading, "tract" would mean both the small selection land appropriated by the United States for a church or schoolhouse *and* the larger section of land withdrawn from public sale for selection by eligible Indians. To avoid such an ambiguity, the treaty drafters inserted the word "aforesaid reservations" to refer back to the land descriptions contained within the numbered paragraphs that would be withdrawn from sale. This interpretation is confirmed by the language in the following sentence as the drafters reverted to referring to the withdrawn parcels as "aforesaid tracts."

The Treaty Journal also makes abundantly clear that the Band representatives understood that the purpose of their designating the tracts of land that appear in the numbered paragraphs was to withdraw the land from sale for future selections by individuals. The idea came directly from Manypenny as his proposed solution to expressed fears among the Bands that their selected lands would be inhospitable. Once Manypenny offered this solution, none of the Band representatives maintained their concern about inhospitable lands, and after some deliberation, each of the Bands decided where their lands would be located. No discussion of reservations or land held in common occurred.

Other sections of the treaty make clear that the numbered paragraphs were not intended to demarcate reservation boundaries. As the Defendants note, the temporary restrictions on alienation are only consistent with individual allotments, and not Indian reservation. As the State says, in most cases, the United States contemplated that it would issue a patent to the land after ten years, unless the Indian Agent requested that a patent be withheld because the individual landowner was incompetent to care for the land himself. And the 1855 Treaty explicitly linked the restraint on alienation to the issuance of a patent: "Provided That such restriction [the restraint on alienation] shall cease only upon the actual issuing of the patent[.]" The State argues that if the government imposed only temporary restrictions on the land, then it was no longer in the public domain, and it could no longer be "set apart" for the creation of a reservation.

Building on this argument, the State notes that even after the initial five-year period for selections, the treaty provided that the unselected lands, "for the further term of five years, [would] be subject to entry in the usual manner and at the same rate per acre, as other adjacent public lands are then held, by Indians only." The State says that if the unselected lands within in the numbered paragraphs were to be sold "in the usual manner and at the same rate . . ." as other public lands,

then the land had always remained in the public domain and had never been set apart for the Tribe to use a reservation.

And the final clause in this section of Article I provides the strongest support of all. After both five-year terms for Indian settlement of the lands ended, the treaty stipulated that "all lands remaining unappropriated by or unsold to the Indians after the expiration of the last-mentioned term, may be sold or disposed of by the United States as in the case of all other public lands."

If the remaining lands (those that had not been selected or purchased) could be disposed of by the United States "as other public lands[,]" then the lands described in the numbered paragraphs could not be an Indian reservation. In other words, the Treaty could not simultaneously set the lands aside as reservations while also allowing for the United States to dispose of the land in any manner it wished.

The Tribe also isolates the language "for the band[s]," which is included in the eight numbered paragraphs designating the territory each Band had selected to be withdrawn from sale at the Treaty Council. As previously discussed, Article I identifies eight parcels of land to be withdrawn from public sale. The text reads:

> The United States will withdraw from sale for the benefit of said Indians as hereinafter provided, all the unsold public lands within the State of Michigan embraced in the following descriptions to wit:
>
> * * *
>
> Third, *for the Beaver Island band* [fractional township coordinates]
>
> Fourth, For the Cross Village, Middle Village, L'Arbrechroche and Bear Creek Bands, and of such Bay Du Noc and Beaver Island Indians as may prefer to live with them [fractional township coordinates]."

The Tribe suggests that the language "For the band" could be understood as creating a reservation. Once again, this interpretation suffers from a failure to reconcile the treaty as a whole.

The provisions that follow—the procedures for individuals to select lands, the procedures for which patents to the land would issue, and the process for the land to be disposed of as "other

public land" once the temporary withdrawal from sale expired—rely on the fractional township descriptions contained in the numbered paragraphs. The land being "for the band" is consistent with interpreting the numbered paragraphs as identifying a large parcel of land from which individual band members would make their own carve-outs.

Any interpretation of "for the bands" that is more expansive cannot be reconciled with the terms that follow and particularly cannot be reconciled with the sunset clause which mandated that after ten years, any unselected or unpurchased land could be disposed of as *other* public land. Public land and Indian reservations are mutually exclusive; land must be taken out of the public domain to become an Indian reservation. Thus, the descriptions used in the numbered paragraphs cannot memorialize reservation borders because it was always understood by the treaty signatories that the lands described within the numbered paragraphs but not chosen would eventually be disposed of like "other public lands." There is thus no ambiguity created by "for the bands."

To be clear, the Bands knew how to bargain for a reservation if they had wanted to. The Treaty Journal for the 1836 Treaty contains a wealth of discussion about reservations. (PageID.6870; 6872; 6874.) And in fact, the 1836 Treaty established several Indian Reservations using standard language of reservation creation. *See* Treaty of March 28, 1836, art. 2 ("From the cession aforesaid the tribes reserve for their own use, to be held in common the following tracts . . . ."). The Court can thus infer that the Bands were capable of bargaining for an Indian Reservation if they desired to do so. *Mille Lacs*, 526 U.S. at 195–97.

But the Bands did not want reservations; they wanted to hold lands as white settlers did. This is abundantly clear from the Treaty Journal. Remember, these Bands had negotiated for and received Indian reservations in the 1836 Treaty. However, the Government then reformed the treaty terms, rendering the reservations temporary and causing the 19-year period of distrust and

uncertainty that triggered the need for further negotiations in 1855.[4] The Treaty Journal reveals that the Band representatives were fully aware of this history, and it informs their insistence that any lands given to them by the United States come with patents, such that no white man could "touch" their lands.[5] It is clear from the record that the Bands believed that the only way to guarantee their permanent place in Michigan was to hold patents to the lands themselves; the federal government had already demonstrated to the Bands that it could not always be trusted to make good on its promises to hold land for them. The 1855 Treaty provided precisely what they bargained for.

And finally, the Tribe relies heavily on the post-Treaty historical record, which contains references to the "reserves" and "reservations" in correspondence by Indians and federal officials in the immediate post-Treaty era. But when these references are put into context by the Treaty Journal and the entirety of the historical record, such evidence does not present a sufficient disagreement to require submission to a factfinder, even with all justifiable inferences in the Tribe's favor. *Anderson*, 477 U.S. at 251–252.

As an initial matter, the references were made during the time for treaty implementation—i.e. they occurred while Band members alone were entitled to select (and then purchase) lands. At that stage, to a layman, the land would bear many of the characteristics of an Indian reservation.

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[4] The Court also notes that the reservation created in the 1836 Treaty at Little Traverse Bay was 50,000 acres. Under the Tribe's theory of the 1855 Treaty, the government purportedly agreed to create a reservation spanning more than 300 square *miles*. Given the government's stated intentions discussed previously, the Court finds it exceedingly unlikely that the government would have agreed to such terms.

[5] The Tribe's expert witness claims that it is not clear whether the Bands could understand the difference between lands held in common as reservations and lands held in fee as allotments because of difficulties translating English into Anishinaabemowin. However, this claim is fatally undercut by the Bands' previous treaty negotiations, which establish that they *were* able to distinguish between the different types of land ownership despite any linguistic difficulties. In fact, the Bands *initiated* the treaty negotiations by offering to sell their lands, "with some reserves." In 1855, the Bands—with full knowledge of the 1836 Treaty—could not have mistaken Manypenny's offer of land as an offer to establish Indian Reservations under these circumstances.

Most importantly, the land was not open to white settlement. But it is clear from the Treaty Journal and the Treaty text that the *signatories* to the Treaty understood that the lands designated to be withdrawn from sale would eventually be disposed of as other public land, once the time for selections and purchases expired. So while the land may have colloquially been referred to as "reserves" or "reservations," the surrounding context makes clear that those terms were not used in the sense that the United States had created a permanent set-aside of land for Indian purposes through the 1855 Treaty. Additionally, the post-Treaty accounts of Manypenny and Gilbert conclusively refute any notion that the lands were to be considered an Indian reservation. (*See* PageID.7532 (Manypenny: "[T]he Indians are to have assigned permanent homes to be hereafter confirmed to them in small tracts, in severalty[.]"); PageID.7558 (Gilbert: "[T]he main feature is a provision securing to each family and to such single persons as are provided for, a home in Michigan[.]").

It is also of note that the Tribe changed course at oral argument, offering its own theory of treaty interpretation for the first time, which similarly sliced-and-diced the Treaty until it no longer bore any resemblance to the terms signed by the Bands and ratified by the United States.[6]

Under the Tribe's reading, the 1855 Treaty simultaneously created Indian reservations for the Bands while also allowing for allotments. The Tribe reaches this result by dividing Article I into two finite sections (which are shaded red and blue in the demonstrative exhibit). It would have the Court rewrite the Treaty so that the first sentence of Article I reads: "The United States will withdraw from sale for the benefit of said Indians ~~as hereinafter provided~~, all the unsold public lands within the State of Michigan" contained within the eight descriptions that followed. It would then have the Court conclude that Article I ends with the numbered land descriptions, so that all of the rules and

[6] Since there is no record of the Tribe's treaty construction in the briefing, the Court has attached the demonstrative exhibit provided by the Tribe at oral argument as an exhibit to this Opinion.

procedures that followed for the provisioning of the land to individual Indians would come within a newly-constituted Article II.

But that's not the way the treaty is structured. All the disputed terms fall within Article I. And "as hereinafter provided" bestows meaning on the action described in the first sentence of Article I. It means that the terms and conditions that follow relate back to the United States' withdrawal of the land. In other words, the withdrawal of land for the benefit of the Indians was not done unconditionally; it was done for the purpose described in Article I and under the terms provided by the same. When read in this manner, the Tribe's interpretation cannot be sustained because the additional terms and conditions on the United States' withdrawal of the land is inconsistent with the establishment of an Indian reservation.

As has been thoroughly discussed, when the United States allows for individual Indians to select land, which they would hold in fee, it does not meet the requirement of a federal set aside for Indian purposes or federal superintendence. Similarly, when the United States maintains its ability to dispose of the alleged Indian reservation after a finite time "as in the case of other public lands," then no Indian reservation is established. Article I does precisely these things. In sum, it is only through a vast re-writing of the Treaty, that the Tribe arrives at its conclusion that an Indian reservation was created.

Under these circumstances, the Court "cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' runs counter to a tribe's later claims." *Klamath*, 473 U.S. at 774. Here, the Court has given the Tribe's claims a fair appraisal by undertaking an extensive review of the historical record and a close read of the 1855 Treaty. After a full review, the Court concludes that the 1855 Treaty simply cannot bear the construction that the Tribe would place on it, *especially* considering the historical context. The Tribe's predecessor bands bargained for—and received—permanent homes in Michigan in the form of individual allotments. They did not bargain for an

Indian reservation, and no such reservation was created by the unambiguous treaty terms because the terms do not establish a federal set aside of land for Indian purposes or indefinite federal superintendence over the land. *See Citizen Band*, 498 U.S. at 511.

V.

The Tribe asserts that their predecessors understood that a treaty requiring the United States to withdraw land from sale for their benefit created an Indian reservation. But when the Treaty is placed in the relevant historical context, it cannot plausibly be read to have created an Indian reservation, and the Tribe's predecessors did not believe that it did so. Accordingly, summary judgment is warranted on the Tribe's claims. Additionally, since the Court concludes that no reservation was created, it does not reach the Defendants' arguments in the alternative for disestablishment.

ORDER

For the reasons explained in the accompanying opinion, the Defendants' motions (ECF Nos. 567; 579; 581) for summary judgment are **GRANTED.**

Plaintiff's motions for partial summary judgment on various defenses (ECF Nos. 573; 585) are **DISMISSED AS MOOT.**

IT IS SO ORDERED.

JUDGMENT TO FOLLOW.

Date: August 15, 2019

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge